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CASE NO. A-256

in the Supreme Court of the United States

OCTOBER TERM, 1985

DANIEL GONZALES GELLERT,
Petitioner,

v.

EASTERN AIR LINES, Inc.,
Respondent,

PETITION FOR WRIT OF CERTIORARI ON APPEAL FROM THE SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED

Can a corporation claim First Amendment rights, or are these rights limited to a good cause and limited to an individual? Can these rights be granted if for the wrong reason such as making fun of a citizen, or for the censure of free speech? Are there limits to personal opinion in private matters, and in cases where the public good in transportation may be adversely effected?

Can a citizen claim privacy in a libel case when his confidential medical records are published, which were unknown to the reader of the newspaper, and have been resolved in his favor prior to the publication?

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INTRODUCTION

This case involves a pro se appeal by Daniel Gonzales Gellert, ("GELLERT") from an adverse final judgement in a defamation action against his employer Eastern Air Lines, Inc. ("EASTERN").

This matter was tried before a jury, which resulted in a First Amendment right of the respondent to libel the petitioner as a matter of a "personal opinion".

> "He's paranoid.
> But why, I asked if you believe he is paranoid is he allowed to fly Eastern Airlines passenger jets?
> It's awfully hard to fire anyone these days.
> Anyway we have three of them in the cockpit.
> Know what I mean?

See: *Gellert v. Eastern Air Lines, Inc.*, 466 So.2d mem 9 (Fla. 3DCA 1985).

This was affirmed per curiam by the district court, and the Florida Supreme Court lacked jurisdiction to review. The Record of Appeal before the district court is "R", and the Supreme Court is "R-S". The trial transcript is designated as "T" and plaintiff's (petitioner's) evidence as "P", defendant's (respondent's) as "D".

This was the second trial in this cause, and there is a full and complete review of the Constitutional issue available in: *Eastern Air Lines, Inc. v. Gellert* 438 So.2d 923 (Fla. 3DCA 19S3)., as far as the debate on opinion.

There is no cross-appeal in this cause, therefore only Constitutional issues which are properly referable to this Court are presented for review.

The petitioner is an airline pilot with the rank of captain and a pilot-in-command under federal law.

The petitioner testified during a National Transportation Safety Board hearing in regard to his own personal experiences in the respondent's L1011 aircraft, operating as flight 401; which crashed in the Everglades near Miami, Florida and killing 103 people.

While the petitioner was not in anyway involved in that crash, nor was he on board; he did fly this same aircraft prior to the crash and gave information to the respondent Eastern, which could have prevented the accident.

The respondent commenced a retaliatory conduct, designed to censure the petitioner's First Amendment right to free speech on this topic, and utilized the medical department as a tool of discipline, in an attempt to drive the petitioner from it's employ.

The respondent takes refuge in it's right to defame the petitioner in the "tone' of a letter that the petitioner wrote the FBI, under the Constitutional Petitioner's Clause. In this letter some facts were sent, which were true, and not challenged by Eastern.

> The question is presented: Can a corporation claim First Amendment rights, or are these rights limited to a good cause and limited to an individual? Can these rights be granted if for the wrong reason such as making fun of a citizen, or for the censure of free speech? Are there limits to personal opinion in private matters, and in cases where the public good in transportation may be adversely effected?
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QUESTIONS PRESENTED FOR REVIEW

I

WHETHER, under the First Amendment, the respondent, who was the defendant at trial, has superior rights, since the jury verdict from which this cause is appealed, granted him the defense of "personal opinion"; which was not disturbed on appeal either by the district court, or the Florida Supreme Court, when the libel was to censure the free speech of the petitioner, which is also guaranteed by the First Amendment.

There are competing interests of both parties, which brings a serious conflict under the First Amendment for review.

The respondent's agent, a James Ashlock, published in the *LONDON SUNDAY TIMES*, November 19, 1978:

> "He's Paranoid.
> But why, I asked if you believe that he is paranoid is he allowed to fly Eastern Airlines passenger jets? It's awfully hard to fire anyone these days.
> Anyway, we have three of them in the cockpit. Know what I mean?".

Ashlock was the respondent's director of news. He never met the petitioner. He's source for the libel was the file that the respondent had accumulated on the petitioner, in an employee/employer relationship.

Ashlock published undisclosed defamatory facts, and as such he is not privileged to a First Amendment defense of opinion.

The petitioner has the Constitutional right to privacy as to the medical file that the respondent has built on him, since the nature of the employee relationship grants the

respondent Eastern, to examine it's flight crews, and as the keeper of these confidential medical records, a fiduciary responsibility.

Ashlock's testimony:

"Q. Now, how much do you know about Dan Gellert?

A. Not an awful lot, just general knowledge." (T 75).

The libel was completely unsolicited, since Blundy, the reporter for the *LONDON SUNDAY TIMES* called about the L1011 crash, and did not know anything about the libelous comments voluntarily published by Ashlock. These libelous facts were unkown to the reader of this newspaper article. Simply, Ashlock was not asked to comment on the medical qualifications of the petitioner but rather the controversy concerning the Eastern L1011 crash of flight 401.

WHETHER, in this cause the respondent can utilize an intentional lie or a misstatement of fact to gain protection under the First Amendment, as to right of personal opinion.

Ashlock's comment that the petitioner is only allowed to fly since it is awfully hard to fire him, and there are three pilots in the cockpit, indicates to the reader that the petitioner is under the control of subordinate flight crew members. This is in conflict with federal law rights that the petitioner has. Defamatory passages must be considered in the context of the entire article. See: *Cianci v. New Times Pub. Co.* 639 F.2d 54 (1980).

Opinions based on false facts are actionable against one who had knowledge of the falsity or probable falsity of underlying facts. Misstatements of fact, when made with actual malice are unprotected by the Constitution. See: *McManus v. Doubleday & Co., Inc.* 513 F.Supp. 1383 (1981).

By virtue of the libel, Ashlock knew that the petitioner was an operational pilot flying the respondent's passenger jets, and that this libel was going to be published in an international news paper, which would characterize the petitioner as mentally incompetent to safely carry out his flying duties.

The Supreme Court has specifically recognized that the characterization of a person's conduct as reasonable or unreasonable is a protected statement of opinion. See: *Nat. Foundation for Cancer Res. v. Council of BBB* 705 F2d 98 (1983). In this cause the Court is specifically asked to determine if a Constitutionally protected defense can deny the petitioner's employment rights, and rights under the Commerce Clause of the Constitution.

WHETHER, there is a First Amendment defense of opinion, or any defense if a libel is published to make the petitioner a laughing-stock or the butt of a joke and a jest.

In this cause, Frank Borman, the head of the respondent Eastern testified, that he approved of this libel:

> " This was in an aside or a jocular manner, I have no doubt.
> Q. Do you think it was said in a jocular manner?
>
> A. I would expect so.
> often times, regardless of the seriousness of the interview in which the conversation, it takes on a light tone. (T 33)
>
> A. As I said before, I would expect that he was joking in that mood" (T 36)

Is there a new defense that allows a person of higher standing in society, or a corporation to use a citizen as the entertainment of his vindictiveness; or is this a defense that is beyond a

First Amendment protection as to a defendant's personal opinion privilege? Borman testified:

> "A. I'm president and Chief Executive Officer of Eastern Airlines.
>
> Q. And you are also Chairman of the Board?
>
> A. Chairman of the Board, Correct." (T 4)

Borman did not censure or correct the imposition of the libel, since in his mind, Ashlock is entitled to joke and call the petitioner paranoid and mentally incompetent to safely carry out his flight duties, while representing Eastern in his official capacity.

WHETHER, in this cause there is a right that the petitioner can claim to over come the respondent's defense of personal opinion under the First Amendment, since the nature of this libel is akin, or same as that courts have recognized as unprotected as a "man in falsely shouting fire in a theatre and causing a panic"; in the instant cause a false statement that the petitioner is mentally incompetent to fly, and that Eastern Airlines is forced to allow him to fly since it has not been able to fire him, and that this is the only reason that he is in command of Eastern's passenger jets is a panic causing situation. Should this statement be granted a "perfect immunity" or is this a repressive verdict which denied the petitioner's free speech and Constitutional rights to his good name?

> "for as Mr. Justice Stewart has reminded us, the individual's right to the protection of his own good name reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty."

Since the day of John Milton in 1644 to the present, men have written on this topic as John Stuart Mill in ON LIBERTY in 1859:

> "even opinions lose immunity, when the circumstances in which they are expressed are such as to constitute their expression a positive instigation to some mischievous act. An opinion that corn-dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before a house of a corn-dealer, or when handed about among the same mob in the form of a placard."

The petitioner is a professional airline pilot, a captain and a pilot-in-command under federal law, in the employ of the respondent Eastern Airlines; as such, the libel is even more than libel per se, which by definition is "a publication which would be inconsistent and incompatible with the petitioner's proper exercise of his trade or profession." There is no immunity as to an opinion which would be in the nature of yelling fire; or when the respondent used libel to interfere with the petitioner's ability to provide safety to those in his care; and under law *only in his care.*

Eastern has documented information on the petitioner, as to his outstanding mental qualifications to safely perform his flying duties. Eastern has joked and abused the petitioner repeatedly about his outstanding mental sanity, since Eastern's executives regard their pilots as less then of a high degree of sanity as the letter from Bell, the respondent's senior vp for law stated on January of 1975:

> "Attached is a letter from Gellert and his Certificate of Sanity. This has created a whole

new worry in my mind. His high degree of Sanity is in such stark contrast with the other pilots that I know." (P 14)

Federal Aviation Regulations, (FAR) 91.3 (a):
"The pilot in command of an aircraft is directly responsible for, and is the final authority as to, the operation of that aircraft."

FAR 121.533 (d), (e) and 121.535 (d), (e):
"Each pilot in command of an aircraft is, during flight time, in command of the aircraft and crew and is responsible for the safety of the passengers, crewmembers, cargo, and aircraft."

"Each pilot in command has full control and authority in the operation of that aircraft, without limitations, over other crewmembers and their duties during flight time whether or not he holds valid certificates authorizing him to perform the duties of those crewmembers."

The question, whether the petitioner is entitled to the rule of law which flows from the Commerce Clause of the Constitution, Section 8. "To regulate Commerce with foreign Nations, and among the several States, and the Indian Tribes.", or not? Can the respondent gain First Amendment rights to suppress or interfere with the petitioner's authority and Constitutional rights?

WHETHER, there are reduced Constitutional rights available to a defendant in a private matter issue, as opposed to a case involving public matters. See: *DUN & BRADSTREET,INC. v. GREENMOSS BUILDERS, INC.* 472 US 86 L.ED2d 593, 105 S.CT.

The First Amendment interest in protecting this type of expression should not be granted. A confidential medical

file, which ultimately was resolved in the petitioner's favor should not be the basis of a Constitutionally protected right of personal opinion. It is remote to consider this as a matter of public concern, or that it is a matter which would be a debate on public issues and should be an uninhibited, robust, and wide-open.

This case does not offer even the slightest debate on public affairs, or is an essence of self-government.

This case involves speech matters of purely private concern and as such it is of less First Amendment concern. There are no censorships of the press as the defendant corporation is not a media.

This particular interest warrants no special protection when – as in this case – the speech is wholly false and clearly damaging to the victim's business reputation.

A pilot-in-command must posses a medical certificate issued by the Federal Aviation Administration's approved medical doctor. A pilots stock-in-trade is his reputation. His medical qualification, especially his mental competence is his most important asset. Without this he is unemployable, he is a liability and a menace. For the employer, an airline, who in the eye of the public is the provider of safe transportation, to accuse a pilot of mental incompetence to safely fly, should be beyond a Constitutional and First Amendment protection of personal opinion. Court's have recognized that the imputation of insanity or the impairment of mental faculties was libel per se. See: *Cowper v. Vannier* 156 N. E. 2d 761 (1959) and *Goldwater v. Ginzberg* 414 F. 2d 324 (1969).

WHETHER, a corporation can claim rights which would not be available to a citizen, an individual. Frank Borman, since he is the highest ranking officer that represent Eastern; who's decisions are beyond question and control, should be

the only individual who in this cause could determine the liability and responsibility of the respondent Eastern. While admittedly, Ashlock had the authority to publish the libel, what is very significant is that Borman completely approved of it.

A corporation has rights under the law in libel; see: *Neiman-Marcus Co. v. Lait* 107 F.Supp. 96 (1952), then isn't time to establish liability on this same legal basis for corporations also? When a contract or libel is approved by the Chief Executive Officer of the respondent corporation Eastern, then it is a matter that is proven on the spot. Borman:

"A. I see that sentence, "He's paranoid," yes.

Q. Then there is a quotation:
"But why I ask, if you believe he's paranoid, is he allowed to any of Eastern Airline's passengers."
It says, "Ashlock: It's awfully hard to fire anyone these days. Anyway we have three of them in the cockpit.
Do you know what I mean?

A. I read that, yes sir.

Q. You said that with Mr. Ashlock, you had no problem with him over the truthfulness and fairness of his reports?

A. I expect you would have to ask Mr. Ashlock.
This was in an aside or a jocular manner, I have no doubt." (T 32-33)

WHETHER, the respondent corporation is entitled to a First Amendment protection of personal opinion, or is this defense available only to an individual; and only when the opinion is based upon known facts, and publication does not involve undisclosed facts as the basis for the opinion? See:

National Rifle Ass'n. v. Dayton Newspapers, Inc., 555 F.Supp. 1299 (1983).

WHETHER, the publication of private medical matters resulting from the prior unjust medical evaluations of the petitioner are, which were confidential, can be released to the news media, as was in this case, and placing the petitioner in a false light in the public eye, and utilized for the First Amendment defense of personal opinion? Ashlock testified:

"Q. Did Mr. Blundy ever ask you to comment on Captain Gellert's psychiatric state?

A. No, sir.

Q. Did he ever ask you to comment on Captain Gellert's ability to fly an aircraft safely?

A. No, sir."(T. 94)

There is a conflict of Constitutional rights under the First Amendment, on one hand the right of the petitioner to privacy; and the preservation of confidential medical files that the respondent built for the petitioner's demise; and the right of the respondent corporation to the jury verdict of personal opinion. Ashlock initiated the libel. He volunteered it. He was not asked.

Eastern in a prior case accused the petitioner, and tried to prove a medical incompetence of the petitioner, in a second case that it did not libel the petitioner, and in this case that it has the right to this libel as a jest, a joke and in the lighter tone. What remedy if any does an individual have?

WHETHER the respondent can hide behind a "shield" of First Amendment right to opinion, when the libel was published to censure the petitioner's freedom of speech,

also guaranteed by the First Amendment, to comment on and freely discuss the respondent's L1011 crash which resulted in 103 deaths.

Can medicine and libel be a tool to overcome the disadvantage in a newspaper article?

Ashlock testified:

"Q. (By Mr. Popper) What was the complaint about?

A. It was basically about the L-1011 accident." (T 69)

"He said Eastern was out to get him; that we tried to crash a plane in order to kill him; that we deliberately altered the altitude instruments on the plane he was flying. He's paranoid." (T 72)

There was a letter that the petitioner wrote to the FBI, which according to the Constitutional Petitioner's Clause, was to convey certain information to the Bureau, but did not make the statement that Ashlock published. This letter again was only available to Ashlock, and not to the reader of the *LONDON SUNDAY TIMES*, as this was undisclosed material that was in the respondent's file only.

The respondent corporation's Chief Executive Officer, a Frank Borman testified:

"Q. Didn't that cause you to instigate an investigation of Captain Gellert?

A. I did not instigate an investigation, I was concerned by the tone of the letter? (T 15)

There were no concern's about the content or facts, but the tone. How far can the First Amendment defense of opinion

be stretched when it is applied to a "tone" and not to facts in a libel?

WHETHER, the State of Florida denied the Constitutional right of this petitioner to be heard under the Petition Clause, since on appeal, the Supreme Court ruled that it lacked jurisdiction to review this cause. In Florida, it is the intermediate court which decides as to which cases the Supreme Court has jurisdiction to review.

In this cause, as a result Constitutional issues which normally should have been resolved at that level were denied. The Supreme Court did cite as authority, *Dodi Publishing Co. v. Editorial America, S.A.*, 385 So.2d 1369 (Fla. 1980). The only significance that this case seem to resolve is that under Florida law a per curiam affirmance, is exactly that, and that a cited authority attached is of no significant importance as to appeal or any rights arising from same. The only reviewable law is if there is a decision that expressly and directly in conflict; and not the cited authority that one may feel is significant.

THEREFORE, under Florida law, this case must stand or fall on the cited Constitutional issues, since Florida affirmed the jury verdict which granted the respondent corporation the First Amendment defense of personal opinion of it's news director to libel, with the expressed approval of the corporations' Chief Executive Officer.

The Supreme Court lacked jurisdiction, and as such there is *not* a procedural defect that in anyway would disturb or interfere with the jurisdiction of this Court.

STATEMENT OF THE CASE

During closing argument, the respondent's attorney, a Calvin David told the jury a misstatement of fact:

> "Mr. Gellert, has brought five lawsuits, 30 or 30 grievances, so don't you be the first jury to award him in one.
>
> He's not your normal individual." (T 109)

It is proper to ignore the smear, "He's not your normal individual", since this is the on-going defamation of the defendant that continued even during trial.

The misstatement of fact, which the petitioner was unable to challenge, of course was that Gellert has been involved in five lawsuits, and no jury has found for him.

The petitioner went to trial in September of 1977; this case resulted in a 1.6 million dollar jury verdict, which was reversed by the trial court, on the legal premise that Florida did not recognize intentional infliction of emotional distress, standing on it's own, with out impact or an independent accompanying tort.

This was upheld on appeal, see: *Gellert v. Eastern Air Lines Inc.*, 370 So.2d 802 (Fla. 3DCA 1979) and the Florida Supreme Court denied certiorari, see: 381 So.2d 766 (Fla. 1980); while an other case during this same time was certified to the Supreme Court, see: *Ford Motor Credit Co. v. Sheehan* 373 So.2d 956 (Fla.) on the same issue. The district court later repudiated it's opinion in this regard, but to late to offer this petitioner any relief. See: *Dominquez v. Equitable Life Assur. Soc.* 438 So.2d 58 (Fla. 3DCA 1983). The above case gives this appeal a good view of the controversy, and out lines the defendant's malice.

This case is a retrial. See: *Eastern Airlines v. Gellert* 438 So.2d 923 (Fla. 3DCA 1983). That trial resulted in an other jury verdict for the petitioner, in the sum of $275.000.00; which was taken away, [illegible] through any fault of this petitioner.

The district court's debate on opinion and mixed opinion perhaps gave rise to the respondent's blatant position to the right of libel as a joke and a jest. This unconstitutional line of defense was impossible for the petitioner to stop, and culminated in a deception of the jury on the force of law and the credibility of the evidence. Certainly, since two prior juries have given a total of 1.875 million in recovery, it is a pungent lie for Calvin David to tell the jury "don't you be the first to award him in one".

The 30 or so grievances did take place, covering the back pay for the petitioner, when he was grounded medically with out a medical just on the orders of Borman; then refused sick-leave pay; vacation pay already earned was refused the petitioner, and other wrongs that the petitioner as an employee had under law.

Eastern Air Lines, Inc., v. Gellert 431 So.2d 329 (Fla. 3DCA 1983) was a case when the respondent tried to avoid giving the petitioner the information; that while this controversy was raging, that the respondent through it's attorney Anania and it's insurance company USAIG, U.S. Aviation Underwritters was involved in the petitioner's private and business life. Following him by private investigators like P. Knezevich, and calling the judges in a divorce and child custody case; Judges Cowart and Waddell; and interfering in the petitioner's strictly private matters.

In *Eastern Air Lines, Inc., v. Gellert* 452 So.2d 570 (Fla. 3DCA 1984), the respondent attempted to turn tables on the petitioner by this appeal, since John Antoon, who was the former attorney representing the petitioner's former wife

was working for the respondent Eastern,; using the divorce court callendar so that the petitioner could be suspended for missing Eastern flight's, since we can not be in two places at anyone time; resulting in 2 month loss of pay for the petitioner, which was in the most part returned by those 30 grievances; defamed the petitioner in child custody proceedings by implying mental problems as a result of Eastern's confidential information relayed to Antoon; and Antoon sent confidential material from the sealed divorce file to Eastern.

In *Bell v. Gellert* 469 So.2d 141 (Fla. 3DCA 1985) counts representing a suit for $2.500.000.00 against Gellert were dismissed and affirmed since the claim was a result of a grievance that the petitioner was forced to file.

In *Gellert v. Eastern Air Lines, Inc.*, 688 F.2d 723 (1982) the respondent moved the case to the federal jurisdiction and was able to dismiss the case as a preempted case under federal law. While this was reversed, there remained no federal issue.

After two unjust medical groundings covering about two years, Eastern resorted to libel designed to interfere with the petitioner's rights under federal law, and drive him from it's employ.

STATEMENT OF THE GROUNDS FOR INVOKING JURISDICTION

The first consideration is based upon the right of this petioner to recover in a libel action under the First Amendment, since the federal jurisdiction has de novo review responsibility in libel action of evidence of actual malice. See: *Marcone v. Penthouse Intern. Magazine For Men* 754 F.2d 1072 (1985).

The First Amendment does not afford protection for a misstatement of fact. "There is no constitutional value in false statements of fact." Id. at 340 94 S.Ct at 3007. *Clark v. American Broadcasting Co., Inc.* 684 F2d 1208 (1982) and the intentional lie that the petitioner has not received anything from a jury, or that he is paranoid and mentally incompetent to fly, are serious misstatements of fact; and are intentional lies that are beyond protection by the First Amendment, or any defense imaginable.

The right of opinion as protected in cases where an individual expresses an opinion on issues of common knowledge, in this cause, Ashlock released unknown information to the reader from the confidential files of the respondent Eastern; and this information was false since on a medical review the competence and high degree of the petitioner's sanity has been well established; and at best all medical information that the respondent would have would be highly confidential.

"Q. You knew that Captain Gellert was flying? You had that information?

A. I think I knew he was flying at that time, yes, sir." (T. 66)

Ashlock acted with actual malice to publish that one of Eastern's operational pilots is flying, while the airline and he made the factual statement that he was mentally incompetent to fly, since he is paranoid, but that the airline could not fire him, since it's awful hard to fire anyone these days.

"Q. (By Mr. Popper) What was the complaint about?

A. It was basically about the L1011 accident." (T.69)

"Q. When you first received the article, is that when you looked up the precise definition of the word "paranoia" or "paranoid"?

A. Yes.

"Q. Did that definition comport with what you intended to impart to Mr. Blundy concerning Captain Gellert's complaints in the letter to the FBI?

A. Yes, sir. (T. 84-85)

"Q. When you told Mr. Blundy's words to the effect that you thought Captain Gellert, based upon this letter, was I'll use the word "paranoid", were you giving your personal opinion?

A. Yes. It would have to have been." (T. 92)

"Q. "It's awfully hard to fire anyone these days—" I you don't recall if you specifically said those exact words, but did you intent to get that message across to Mr. Blundey?

A. Yes, sir. That's a perfect statement of the facts." (T. 85).

A perfect statement of the facts, Ashlock while representing the respondent Eastern published the libel knowing that it would be printed in a news paper, the LONDON SUNDAY TIMES:

"Q. (By Mr. Popper) In response to Blundy in your conversations about the L1011, were you telling him—

A. Telling him the position of Eastern Airlines," (T. 82 83).

"Q. Did he tell you he was researching a story?

A. That's normally what people call me for.

"Q. Did he tell you sir, research, r-e-s-e-a-r-c-h?

A. He was indentifying himself, he started asking me these questions researching. (T. 83)

"Q. He didn't tell you it was going to come out in the *London Sunday Times*?

A. He never said it in those words. I was assuming he was researching a story he planned to print." (T 83)

Frank Borman, the head of Eastern testified:

"Q. (By Mr. Popper) Had you ever flown with Captain Gellert?

A. I, as a passenger, I have, yes.

"Q. On several occasion.?

A. On numerous, yes, several occasions.

"Q. You had no problems with his flying, I gather?

A. I did not." (T 7)

This should fully underscore the petitioner's high degree of sanity. Eastern's only intent was to discredit the petitioner.

The petitioner never made the statement that Ashlock published: "He said Eastern was out to get him, that we tried to crash a plane in order to kill him." Borman testified that he was concerned only by the tone of the letter, and not the facts:

> "Q. Didn't that cause you to instigate an investigation of Captain Gellert?
>
> A. I did not instigate an investigation, I was concerned by the tone of the letter? (T15).

The issue that the petitioner responded to statement's made by an Eastern pilot not to testify are recorded in *Gellert v. Eastern Air Lines, Inc.*, 370 So.2d 805 (Fla. 3DCA). These statement's which the district court ruled were: "To the contrary, the pilot who so advised Gellert testified he had done so on his own." does not diminish the proper concern's that the petitioner was entitled to, since these warnings were in the nature of "fighting words". He told the petitioner that he would be failed on medicals and flight checks in retaliation for his NTSB testimony. The petitioner as a responsible pilot in command has not only the right but an obligation under the Constitutional Petitioner's Cause to clear up this matter through the FBI.

By the very nature of the pilot in command responsibility there is a constant flow of letters and documents from pilots to the FAA, NTSB and FBI.

There is nothing significant in this and especially on Eastern since there have been some problems which the management was somewhat insensitive to. The latest public matter that would underscore this be the "O" ring problem that almost resulted in great loss of life, when on routine maintenance, these "O" rings were left out repeatedly with out any responsible action by manament, until it happened on all three engines on an L1011 over the Atlantic Ocean.

Borman approved the libelous publication of Ashlock, and acknowledged the authority and responsibility that Ashlock had as the director of news for the respondent Eastern Airlines:

"Q. Now wasn't he known as the voice of Eastern?

A. In the local press I think he was sometimes refered to as the voice of Eastern, yes sir.

Q. Did he have a right to come in and represent Eastern's position with the press?

A. He had a responsibility to present our position with as much integrity and openness as he could.

Q. Do you have any doubts that he did?

A. In the years that he was in that position I cannot fault his performance. I have great confidence in his abilities and his integrity. (T. 31)

A. I see that sentence, "He's paranoid," yes.

Q. Then there is a quotation:

"But why I ask, if you believe he's paranoid is he allowed to any of Eastern Airline's passengers.
It says, "Ashlock: It's awfully hard to fire anyone these days. Anyway we have three of them in the cockpit. Do you know what I mean?

A. I read that, yes sir.

Q. You said that with Mr. Ashlock, you had no problem with him over the truthfulness and fairness of his reports.

A. I expect you would have to ask Mr. Ashlock. This was in an aside or a jocular manner, I have no doubt.
(T. 32-33)

Q. What do you mean by, "Jim Ashlock being an interface with the press"?

A. Well, Jim Ashlock's duty at his former job was primarily to fulfill inquiries from the press." (T. 35)

This is the case in a nut-shell. The responsible officer, the director for news publishes a libel and the president, chairman of the board and Chief Executive Officer approves it since he believes that the libel was published as a joke and a jest.

The former cases which are available to the Court to prove the malice that the corporation of Eastern had in this cause, and the approval of the headman of the respondent places this far beyond the possible First Amendment defense of opinion.

During the respondent's closing argument the jury were told:

> "Mr. Ashlock's personal opinion, and whether he was making it for Eastern or for himself makes no difference what his personal opinion." (T. 124)

Since this appeal is based only on the jury verdict giving a First Amendment defense to personal opinion, of course it makes a great deal of difference.

In the enclosed *Motion For New Trial* this legal issue is preserved for appeal. #8: "That the verdict holding statement in the London Sunday Times to be that, as a personal statement of Ashlock, was contrary to the manifest weight of the testimony in this cause."

Ashlock testified that the petitioner is a competent pilot and that Eastern had no just cause to fire him. This is again a misstatement of fact and an intentional lie in the publication.

"A. I don't think so because he is a capable pilot." (T. 91)

"Why is it awfully difficult these days?

Well, you have to have good cause. That's one reason.

Q. Did Eastern have good cause?

A. No, sir. (T. 105)

Q. When you told Mr. Blundy's words to the effect that you thought Captain Gellert, based upon this letter, was— I'll use the word "paranoid" were you giving your own personal opinion?

A. Yes. It would have to have been. (T. 92)

Ashlock admitted the publication of the libel; he admitted that he committed a misstatement of the fact/intentional lie, and as such he and through him the respondent Eastern is not entitled to a First Amendment defense of the jury verdict of personal opinion based upon his testimony.

This cause is a private matter as opposed to a public matter, and as such, there is a reduced Constitutional value of speech. See: *Dun and Bradstreet, Inc., v. Greenmoss Builders* 472 US 86 L.Ed2d 593, 105 S.Ct,

The petitioner filed a *Motion for Relief and Mandamus*, which the District Court ruled to be the petitioner's brief of appellant herein, dated November 2, 1984.

On pages 1, 3, 4, 5, 8, 11, 12, 16, 18, the petitioner preserved the basis of the federal question of this appeal. Arguing the First Amendment right of the petitioner, and the element of the joke defense, and the lack of the personal opinion defense under Constitutional grounds.

There are two briefs placed before the Florida Supreme Court. In the *Brief of Petitioner on Jurisdiction*, the petitioner argued and preserved the federal question on pages, 2, 3, 4, 7, 8, 9, 11, 12, 13. "Most jurisdictions, while upholding the First Amendment, recognize that as in this case, the defendant has no Constitutional right or value in false statement of fact; neither an intentional lie." Page 13. In the *Brief of the Petitioner on Discretionary Jurisdiction*, pages 4, 5, 6, 7.

In the instant cause, under Florida law there is a conflict, since in *Gellert*, the determination of fact or opinion was submitted to a jury, while in *Nodar v. Galbreath* 462 So.2d 803 (Fla. 1984), it is a matter of law to be determined by the court. It is requested that the Court certify this to the Florida Supreme Court for resolution under Rule 9.030 (a) Jurisdiction of Supreme Court. (2), (C).

> "In conjunction with this, defendant argues that the trial court compounded its error by allowing the jury to decide whether the statements were fact or opinion. Certainly, adequate precedent exists for the proposition that courts, and not juries make

this determination. *Nodar v. Galbreath* 429 So.2d 718 (Fla. 4DCA 1983)

The significance of this is over powering in a case such as this. The petitioner could not over come the statement during closing argument that: "Mr. Ashlock's personal opinion, and whether he was making it for Eastern or for himself makes no difference,"; while if this determination would have been made by the court, then this line of closing argument would have been circumvented.

Is a corporation entitled to a "personal opinion"? This is now a significant Constitutional question, if in fact a corporation has the First Amendment right to it's personal opinion or not. The next question is whether in this cause was it the corporation opinion or the opinion of Ashlock that was the basis for the jury verdict. The wisdom of this being a matter of law to be determined by the court, now is a Constitutional question.

The jury entered a verdict on Friday, May 18, 1984. The Motion for New Trial was denied, and a Final Judgement was entered by the trial court on June 12, 1984. Case No. 79-2402 (CA 10).

This was noticed for appeal on July 12, 1984 before the District Court of Florida, Third District, Case No. 84-1581. On March 12, 1985 this Court ruled:

PER CURIAM. Affirmed. See: *Gellert v. Eastern Air Lines*, 466 So.2d 9 mem (Fla. 3DCA 1985).

On April 19, 1985, a Motion for Rehearing was denied.

On May 20, 1985 an appeal to the Florida Supreme Court was filed; as a Petition on Discretionary Jurisdiction, and also on a Petition on Jurisdiction.

On May 24, 1985, the Petition for Review was dismissed. On June 17, 1985 the order of May 24, 1985 was vacated, and the Petition for Review was dismissed to be reinstated by the Court on motion which was already pending before the Court. On July 24, 1985 the Motion for Reinstatement of Appeal on Jurisdiction was denied. Case No. 67,061.

On the 30th of September, 1985, a Petition for Extention of Time for Docketing was filed; and on October 4, 1985, this was granted by the Supreme Court of the United States; to docket this case to and including December 21, 1985.

This appeal is based upon a jury verdict:

"We, the jury, return the following verdict:

"Number 1. Indicate in the appropriate space below whether the statements attributed to Jim Ashlock, if made, were either a false statement of fact or his own personal opinion. Personal opinion is checked off.

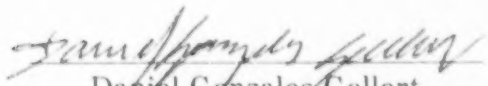
The petitioner is asking the Court to decide if labor RLA grievences are admissible only to demonstrate malice; in a manner which in no way would alter any rights which have resulted from these final and binding decisions.

Also, if under the First Amendment rights, a party to a libel suit can go back to prove the falsity of a defamation without any time restriction.

THEREFORE, the petitioner prays that certiorari will be granted, since the jury verdict of the First Amendment right of opinion came from the Supreme Court's ruling in past cases. In this cause the right of a personal opinion has placed the First Amendment rights of the petitioner and respondent in conflict; and the rights of the petitioner

eminenting from the Commerce Clause of the Constitution. Are there limits to the First Amendment right of personal opinion in this cause, or can this be utilized to make fun of a petitioner as a joke, and destroy and interfere with one's rights to his employment, privacy, and good name?

Respectfully submitted,



Daniel Gonzales Gellert
in the proper person.

CERTIFICATE OF SERVICE:

HAND DELIVERED

I HEREBY CERTIFY that a true copy of the foregoing was ~~mailed by first class U.S. Mail~~ on this // day of December, 1985 to the respondent's attorney, Thornton, David & Murray, P.A. Suite 100, 2950 S.W. 27th Avenue, Miami, Fl. 33133-3704.

Appendix

SUPREME COURT OF THE UNITED STATES

No. A-256

DANIEL GONZALES GELLERT,

Applicant,

v.

EASTERN AIR LINES, INC.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 21, 1985.

/s/ Lewis F. Powell, Jr.
Associate Justice of the Supreme Court of the United States

Dated this 4th
day of October, 1985.

[FILED 1984 MAY 29]

IN THE CIRCUIT COURT OF THE 11TH
JUDICIAL CIRCUIT IN AND FOR
DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 79-2402 (CA 10)

FLORIDA BAR #063883

DANIEL G. GELLERT,

Plaintiff,

v.

EASTERN AIR LINES, INC.
a Delaware Corporation

Defendant.

MOTION FOR NEW TRIAL

COMES NOW Plaintiff, DANIEL G. GELLERT, pursuant to rule 1.50 of the Florida Rule of Civil Procedure moves the Court to set aside the verdict in this cause, and grant movant a New Trial on the following grounds:

1. The verdict is contrary to law.

2. The verdict is contrary to the evidence.

3. The verdict is contrary to the Court's charge:

4. That the Court erred when it refused to grant a mistrial on Motion made by the Plaintiff after the defense attorney in questioning of the witness, Francis Anania, before the jury, did ask said witness whether or not the Plaintiff, Gellert had accused him of taking a Fifty Thousand ($50,000.00) Dollar bribe. This statement was highly prejudicial and

could not be overcome by any cautionary statement by the Court to the jury.

5. That the Court erred in not letting Plaintiff present evidence to substantiate the material that had been placed in the November 19, 1978 article of the London Sunday Time, pertaining to the L-1011. During it's deliberation the jury sent a question without asking for the material which would have covered the matter in question, to prevent the Plaintiff to presenting his side, was highly prejudicial and permitted the Defendant to comment in the final argument without the opportunity for the Plaintiff to have any rebuttal on the particular situation.

6. That the Court erred in permitting the Defendant to discuss Final Judgment of the Divorce of Gellert v. Gellert when stating that the wife had custody of the children, in order to minimize any of the Plaintiff's complaints as to relationships between he and his children. The only thing this statement could do was to leave inferences which were highly prejudicial to the Plaintiff.

7. That the Court erred when it would not permit the Plaintiff to place into evidence correspondence that he had between he and the F.B.I., including memorandum of application from the F.B.I., in regard to Gellert, as it would help to substantiate any further correspondence with the F.B.I.

8. That the verdict holding statement in the London Sunday Times to be that, as a personal statement of Ashlock, was contrary to the manifest weight of the testimony in the cause. That Coronel Borman has stated, in his testimony, the full confidence that he had had in Ashlock, and in no way, did he refute these statements made in the London Sunday Times. Further there were no complaints made as to Gellert's flying whatsoever, as testified to by Buttion and Borman.

9. That in contradiction to the verdict rendered, Ashlock testified that Eastern had no cause to fire Gellert and is

diametrically opposed to the statement that he made to the London Sunday Times, when he said it is difficult to fire somebody nowadays, but there are three in the cockpit. Obviously, Ashlock knew sufficient background of Gellert, to know that there was no reason to fire him, but did know the attitude of Buttion, who would not give any reference for Gellert whatsoever; Borman who thought the article was jocular, and Bell who wanted to pursue actions against Gellert in spite of any psychiatric examinations, and created an entire attitude of anti Gellert with Eastern, and Ashlock was the spokesman for this attitude.

10. That each and every of the above are highly prejudicial, and sufficient for the Court to have granted a mistrial upon proper Motion, which it did not alter an alternative at this time to grant a new Trial.

WHEREFORE, Plaintiff praises this Honorable Court to set aside the verdict in this cause, and grant the movant a New Trial.

/s/ David Popper
DAVID POPPER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed/hand delivered this 29 day of May, 1984, to Barry L. Davis, Esq., THORNTON, DAVID & MURRAY, Suite 210, 25 S.E. Second Avenue, Miami, Florida 33131.

/s/ David Popper
DAVID POPPER

[RECORDED JUL 16 1984]

IN THE CIRCUIT COURT OF 11TH JUDICIAL CIRCUIT
OF FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 79-2402

FLA. BAR NO. 063883

DANIEL G. GELLERT,
Plaintiff, Appellant

vs.

EASTERN AIR LINES, INC.
a Delaware Corporation
Defendants, Appellee

NOTICE OF APPEAL

Notice is given that Daniel G. Gellert, Plaintiff/Appellant, appeals to the District Court of Appeals of Florida, Third District the order of this Court rendered on June 12, 1984. The nature of the order is a final order in favor of the Defendant, Eastern Airlines, Inc. and against the Plaintiff.

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed and/or hand delivered to Barry L. Davis, THORNTON, DAVID & MURRAY, P.A. Suite 210, Ingraham Building, 25 S.E. Second Avenue, Miami, Florida on this 12 day of July, 1984.

/s/ Daniel G. Gellert

Daniel G. Gellert
In Proper Person
P.O. BOX 187
Cocoa Beach, Florida 32931
(305) 781-2769

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

JULY TERM, A.D. 1984

FRIDAY, NOVEMBER 2, 1984

CASE NO. 84-1581

DANIEL GONZALES GELLERT,

Appellant,

vs.

EASTERN AIRLINES, INC.,

Appellee.

It is ordered that appellant's pro se Motion for Relief and Mandamus and Statement of Judicial Acts to be Reviewed filed on October 25, 1984 shall be treated as brief of appellant herein.

A TRUE COPY

ATTEST:

LOUIS J. SPALLONE

Clerk District Court of
Appeal, Third District

By /s/ Evelyn A. Hillman
Deputy Clerk

cc: Daniel Gonzales
Calvin David

/tlk

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1984

FRIDAY, DECEMBER 14, 1984

CASE NO. 84-1581

DANIEL G. Gellert,

Appellant,

vs.

EASTERN AIR LINES, INC.,

Appellee.

Upon consideration, appellee's motion to strike appellant's motion for relief and mandamus and statement of judicial acts to be reviewed is denied. Appellant's motion to add the tort of conspiracy to this cause is hereby denied.

A True Copy

ATTEST:

LOUIS J. SPALLONE

Clerk District Court of
Appeal, Third District

By /s/ Evelyn A. Hillman
Deputy Clerk

cc: Kathleen M. O'Connor
Daniel Gonzales

/elm

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 1985

FRIDAY, APRIL 19, 1985

CASE NO. 84-1581

DANIEL G. GELLERT,

Appellant,

vs.

EASTERN AIR LINES, INC.,
a Delaware corporation,

Appellee.

Upon consideration, appellant's motion for rehearing is hereby denied.

A True Copy

ATTEST:

LOUIS J. SPALLONE

Clerk District Court Of
Appeal, Third District
By /s/ Evelyn A. Hillman
Deputy Clerk

cc: Daniel Gonzales Gellert
Thornton, David & Murray

/hb

IN THE SUPREME COURT OF FLORIDA
FRIDAY, MAY 24, 1985

CASE NO. 67,061

District Court of Appeal,
3d District – No. 84-1581

DANIEL GONZELES GELLERT,

Petitioner,

vs.

EASTERN AIRLINES, INC., ETC.,

Respondent.

It appearing to the Court that it is without jurisdiction, the Petition for Review is hereby dismissed. *Dodi Publishing Co. v. Editorial America, S.A.*, 385 So.2d 1369 (Fla. 1980).

No Motion for Rehearing will be entertained by the Court.

A True Copy

TEST:

(Supreme Court Seal)
/s/ Sid J. White

Sid J. White
Clerk Supreme Court

cc: Hon. Louis J. Spallone, Clerk
Hon. Richard P. Brinker, Clerk
Hon. Margarita Esquiroz, Judge

Mr. Daniel Gonzales Gellert
Thorton, David & Murray

IN THE SUPREME COURT OF FLORIDA
MONDAY, JUNE 17, 1985

CASE NO. 67,061

District Court of Appeal,
3d District – No. 84-1581

DANIEL GONZALES GELLERT,
Petitioner/Appellant,

vs.

EASTERN AIRLINES, INC., ETC.,
Respondent/Appellee.

The Order of this Court dated May 24, 1985, is hereby vacated.

It appearing to the Court that it is without jurisdiction, the Petition for Review is hereby dismissed and no motion for rehearing will be entertained by the Court.

It appearing to the Court that the District Court of Appeal, Third District, did not declare *invalid* a State Statute or a provision of the State Constitution, and that, therefore, it is without jurisdiction, this appeal is hereby dismissed subject to reinstatement if jurisdiction is established on proper motion *filed* within fifteen (15) days from the date of this order. See Article V, Section 3(b)(1), Florida Constitution.

The brief of petitioner filed May 30, 1985, has been treated as a motion for reinstatement and submitted to the Court.

A True Copy

ATTEST:

(Supreme Court Seal)

/s/ Sid J. White

Sid J. White
Clerk Supreme Court

cc: Hon. Louis J. Spallone, Clerk
Hon. Richard P. Brinker, Clerk
Hon. Margarita Esquiroz, Judge

Mr. Daniel Gonzales Gellert
Thornton, David & Murray

SUPREME COURT OF FLORIDA
WEDNESDAY, JULY 24, 1985

CASE NO. 67,061

District Court of Appeal,
3d District – No. 84-1581

DANIEL GONZALES GELLERT,

Appellant,

v.

EASTERN AIRLINES, INC.,

Appellee.

Upon consideration of the Motion for Reinstatement of Appeal on Jurisdiction filed in the above cause by appellant, and response thereto,

IT IS ORDERED that said Motion be and the same is hereby denied.

A True Copy

TEST:

(Supreme Court Seal)

/s/ Sid J. White

Sid J. White
Clerk, Supreme Court

cc: Hon. Louis J. Spallone, Clerk
Hon. Margarita Esquiroz, Judge
Hon. Richard P. Brinker, Clerk

Mr. Daniel Gonzales Gellert
Kathleen M. O'Connor, Esquire

[JAN 16 1975]

interoffice correspondence EASTERN

TO: Capt. W. R. Krepling ADDRESS: MIAFX

FROM: William G. Bell, Jr. ADDRESS: MIALG

SUBJECT: Daniel Gellert DATE: January 13, 1975

Attached is a letter from Gellert and his Certificate of Sanity. This has created a whole new worry in my mind. His high degree of sanity is in such stark contrast with the other pilots that I know.

I am going to be gone until January 20. Perhaps after my return, we should get together on a letter that says since he is sane, that letter to the FBI must have been pure maliciousness, and the next time he does something like that, we will act.

Meanwhile, he should be returned to duty and paid for missed time on a trips missed basis. I would ignore all the Type II claims, etc.

I worry somewhat about the quality of doctor we picked, if $37.50 is half of his bill.

/s/ William G. Bell

William G. Bell, Jr.

Attachment
cc: Mr. W. R. Howard
Dr. J. A. Serrano

Borman at trial: Aide's remarks were only jest

MARVA YORK
Miami News Reporter

Eastern Airlines' $400,000-a-year corporate chairman, president and chief executive officer had his day in court.

Frank Borman spent two hours in Dade County Court yesterday testifying on behalf of a former airline spokesman targeted in a libel lawsuit.

He told Judge Margarita Esquiroz and a six-member jury hearing a retrial of a libel lawsuit that Jim Ashlock was only "joking" when he was quoted in a 1978 London Sunday Times article as calling an Eastern pilot "paranoid."

In an interview by London Sunday Times reporter David Blundy, Ashlock was asked why Eastern had allowed Capt. Daniel Gellert — who had been grounded for seven months in 1974 and for 15 months in 1977-78 after a series of conflicting psychiatric exams — to continue to fly planes.

Ashlock was quoted as saying: "It's awfully hard to fire anyone these days. Anyway, we have three of them in the cockpit. Know what I mean?"

Ashlock was later quoted as saying: . . . I think you ought to know he wrote some very odd letters to the FBI. He said Eastern was out to get him, that we tried to crash a plane in order to kill him, that we deliberately altered the altitude instruments on a plane he was flying. He's paranoid."

Eastern officials have denied Ashlock made the statements. The 52-year-old Cocoa Beach pilot sued.

In 1980, Ashlock's remarks were ruled malicious by a six-member jury in Dade Circuit Court and Gellert was awarded $275,000 — $25,000 in compensatory damages and $250,000 in punitive damages.

Eastern appealed. Later, the Florida Supreme Court changed the guidelines for similar libel lawsuits, sending the Gellert case back for re-trial, said Eastern spokesman Richard McGraw.

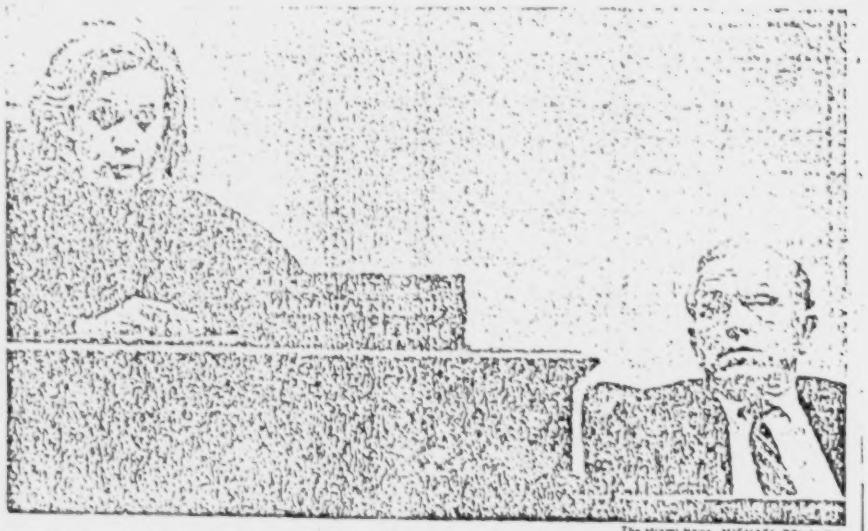
When the libel suit was first tried, Eastern lawyers argued comments made in the story were fair. Gellert, however, said Ashlock's remarks exposed him to ridicule and contempt among fellow employees who posted copies of the story in flight crew quarters.

"I suspect this was an aside or (said) in a jocular manner," Borman testified.

"I have no knowledge of the interview or of the relationship between the reporter and Mr. Ashlock," said Borman, who quickly acded that through his own personal experiences with the press, "I know sometimes interviews take on a lighter tone."

Borman, who said he had read the London Sunday Times news story in its entirety, said Ashlock was a good employee and had done good work for the airline.

"I cannot fault his performance," Borman said. "I have great confidence in his abilities and integrity."



The Miami News - MICHAEL DELANEY

Borman testifies in pilot's libel case: 'Sometimes interviews take on lighter tone'

App. 14

IN THE CIRCUIT COURT OF THE 11TH
JUDICIAL CIRCUIT, IN AND FOR
DADE COUNTY, FLORIDA.

GENERAL JURISDICTION DIVISION

Case No. 79-2402 (10)

DANIEL G. GELLERT,

Plaintiff,

-vs-

EASTERN AIRLINES, INC.,
a Delaware corporation,

Defendant.

Dade County Courthouse
73 West Flagler Street
Miami, Florida

May 18, 1984
Friday, 9:00 o'clock p.m.

The above-entitled matter came on for hearing before the Honorable MARGARITA ESQUIROZ, Circuit Court Judge, and jury, pursuant to Notice.

APPEARANCES:

DAVIS POPPER, ESQ.,
on behalf of the Plaintiff.

THORNTON, DAVID & MURRAY, P.A., by
BARRY L. DAVIS, ESQ., and
CALVIN DAVID, ESQ.,
on behalf of the Defendant.

IN THE CIRCUIT COURT OF THE 11TH
JUDICIAL CIRCUIT IN AND FOR
DADE COUNTY, FLORIDA.

GENERAL JURISDICTION DIVISION

Case No. 79-2402 (10)

DANIEL G. GELLERT,

Plaintiff,

-vs-

EASTERN AIRLINES, INC.,
a Delaware corporation,

Defendant.

Dade County Courthouse
73 West Flagler Street
Miami, Florida

May 18, 1984
Friday, 9:00 o'clock p.m.

The above-entitled matter came on for hearing before the Honorable MARGARITA ESQUIROZ, Circuit Court Judge, and jury, pursuant to Notice.

APPEARANCES:

DAVIS POPPER, ESQ.,
on behalf of the Plaintiff.

THORNTON, DAVID & MURRAY, P.A., by
BARRY L. DAVIS, ESQ., and
CALVIN DAVID, ESQ.,
on behalf of the Defendant.

* * * * *

(Whereupon, at 9:00 o'clock p.m. the jury announced that they had arrived at a verdict.)

THE COURT: Have you reached a verdict?

JUROR NO. 5 (MR. KNOWLES): Yes, ma'am.

THE COURT: Will the Clerk please publish the verdict.

THE CLERK: (Reading) "We, the jury, return the following verdict:

"Number 1. Indicate in the appropriate space below whether the statements attributed to Jim Ashlock, if made, were either a false statement of fact or his own personal opinion.

"Personal opinion" is checked off.

"Number 5. Do you find some fault on the part of James Ashlock, employed at Eastern Airlines?"

Also nothing. There is nothing else here.

"So say we all, this 18th day of May, 1984.

"Max Knowles, foreperson."

THE COURT: All right. Just a moment, counsel.

MR. POPPER: Would you poll the jury, your Honor?

THE COURT: Yes.

Ladies and gentlemen, as I call your names, if the verdict just read is your verdict, would you please state, "That is my verdict"?

(Whereupon, the jury was polled, each member acceding in their verdict.)

THE COURT: Thank you. All right.

(Thereupon, the proceedings were adjourned.)

* * * * *

CERTIFICATE

I, the undersigned authority, do hereby certify that the foregoing is a true and correct Excerpt of the proceedings had in the case of DANIEL G. GELLERT, vs. EASTERN AIRLINES, INC., etc., Case No. 79-2402, before the Honorable MARGARITA ESQUIROZ, Circuit Court Judge, at the time and place herein set forth.

DATED at Miami, Dade County, Florida, this 30th day of September, 1985.

/s/ LAWRENCE ARAYA,

Lawrence Araya,
C.S.R./R.P.R.

Supreme Court, U.S.
FILED
JAN 15 1986
JOSEPH F. SPANIOL, JR.
CLERK

(2)

CASE NO. 85-1020

in the Supreme Court of the United States

October Term, 1985

DANIEL GONZALES GELLERT,
Petitioner,

vs.

EASTERN AIR LINES, INC.,
Respondent

On Petition for a Writ of Certiorari
to the District Court of Appeal of Florida,
Third District

RESPONDENT'S BRIEF IN OPPOSITION

Kathleen M. O'Connor
(Counsel of Record)
THORNTON, DAVID &
MURRAY, P.A.
Suite 100
2950 S.W. 27th Avenue
Miami, Florida 33133
(305) 446-2646
Attorneys for the Respondent

BEST AVAILABLE COPY

32pp

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LIST OF CORPORATE SUBSIDIARIES AND AFFILIATES

The partially owned subsidiaries and affiliates of Eastern Air Lines, Inc. are:

Eastern Air Lines, S.A.
Eastern Air Lines Trading Company
EAL Properties, Inc.
Air Line Reporting Corporation
Aeronautical Radio, Inc.
Air Cargo, Inc.
Air Cargo Facilities, Inc.
Air Lines Clearing House, Inc.
Air Line Tariff Publishers, Inc.
Arizona Fuel Facilities
Atlanta Air Terminal, Inc.
Bradley Facilities, Inc.
CATO Detroit, Michigan
CATO Evanston, Illinois
CATO Washington, D.C.
CATO White Plains, New York
Inter-American Flight Services Company
International Aeradio (Caribbean), Ltd.
Manhattan Air Terminal, Inc.
Portland Fuel Facilities
Societe Int'l de Telcom.
Tinicum Fuel Facilities Corp.

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STATEMENT OF THE CASE

Daniel G. Gellert sued his employer, Eastern Air Lines, Inc., for defamation. The suit was based on statements allegedly made by Jim Ashlock, director of Eastern's news bureau, during a telephone interview in November of 1978, with David Blundy, a reporter for the London Sunday Times. Ashlock was asked to comment about an ongoing dispute between Eastern and Gellert. In an article published in the Times on November 19, 1978, Ashlock is quoted as saying:

> Gellert has been complaining for years. I think you ought to know that he wrote some odd letters to the FBI (Federal Bureau of Investigation). He said Eastern was out to get him, that we tried to crash a plane in order to kill him, that we deliberately altered the altitude instruments on a plane he was flying. He's paranoid.

According to the article, Blundy questioned why Gellert was permitted to fly Eastern's passenger jets, to which Ashlock reportedly replied:

> Its awfully hard to fire anyone these days. . . Anyway, we have three of them in the cockpit. Know what I mean?

Gellert's suit was tried before a jury for the first time in November of 1980, and the jury returned a verdict in Gellert's favor. The final judgment entered in Gellert's favor was reversed on appeal to the District Court of Appeal of Florida, Third District. The reversal was based on an abuse of the trial court's discretion in

regulating Eastern's use of peremptory challenges during jury selection. *See Eastern Air Lines, Inc. v. Gellert*, 438 So.2d 923 (Fla. 3d DCA 1983).

On remand, the case was tried for a second time, and the jury returned a verdict for Eastern. A final judgment was entered in Eastern's favor. On appeal, the District Court of Appeal affirmed. The entire text of the court's decision was:

> PER CURIAM.
> Affirmed. *Applegate v. Barnett Bank of Tallahassee*, 377 So.2d 1150 (Fla. 1979); *Sears Roebuck & Company v. Jackson*, 433 So.2d 1319 (Fla. 3d DCA 1983)

Gellert v. Eastern Air Lines, Inc., 466 So.2d 9 (Fla. 3d DCA 1985), Appendix p. 1.

Gellert then sought review in the Supreme Court of Florida, which has no jurisdiction to review per curiam affirmances of the district courts of appeal. Fla. Const.. art. V, § 3(b)(3); *Dodi Publishing Co. v. Editorial America, S.A.*, 385 So.2d 1369 (Fla. 1980); *Jenkins v. State*, 385 So.2d 1356 (Fla. 1980). Gellert's Petition for Review was dismissed by the Florida Supreme Court, based on lack of jurisdiction.

ARGUMENT

I.

THE COURT LACKS JURISDICTION TO CONSIDER THIS MATTER BECAUSE NO FEDERAL QUESTION HAS BEEN RAISED IN THIS COURT OR IN THE COURT BELOW.

This Court's certiorari jurisdiction over decisions from state courts derives from 28 U.S.C. §1257, which provides in pertinent part that:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> (3) By writ of certiorari . . . where any title right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of . . . the United States.

In his Petition for Writ of Certiorari, Gellert has failed to set forth any "title, right, privilege or immunity" which he is claiming "under the Constitution, treaties or statutes of . . . the United States." Although Gellert discusses various defenses raised below by the Respondent, Gellert does not personally claim any "title, right, privilege or immunity . . . under the Constitution, treaties or statutes of the United States." Based on the fact that no federal question has been presented, the Petition should be dismissed for lack of jurisdiction.

In addition, there was no federal question presented by Gellert to the District Court of Appeal of Florida, Third District, and that court did not pass on any federal question. The issues presented to the appellate court were summarized in Eastern's brief as follows:

> Appellant has raised the following matters in his original brief: (1) the exclusion of evidence during trial by the trial judge; (2) allegations that defense counsel called Gellert a criminal while the trial was in recess and the jury was not present; (3) a statement by defense counsel during closing argument about the result of prior trials to which no objection was made at trial; and (4) the jury's failure to award punitive damages.

See, Answer Brief of Appellee, Eastern Air Lines, Inc., App. 10-11.

It is also apparent that the appellate court did not pass on any federal question. The court's decision is a per curiam affirmance with two case citations, *Applegate v. Barnett Bank of Tallahassee*, 377 So.2d 1150 (Fla. 1979) and *Sears Roebuck & Company v. Jackson*, 433 So.2d 1319 (Fla. 3d DCA 1983). In its Answer Brief below, Eastern argued that it was impossible to respond to Gellert's argument that the trial court erred in excluding evidence during the trial because Gellert did not provide a complete trial transcript. Gellert only furnished a transcript of the testimony of two Eastern employees and the closing argument of Eastern's trial counsel. The transcript did not reflect any of the trial court's evidentiary rulings. *Applegate, supra*, was cited

by Eastern for the proposition that where a party fails to supply the appellate court with an adequate record, an affirmance is mandated.

In its Answer Brief below, Eastern also contended that Gellert's argument in regard to the alleged impropriety of a statement made by Eastern's attorney during closing argument should be rejected because no objection to the statement was made. Eastern cited *Sears Roebuck & Company v. Jackson, supra*, for the proposition that comments during closing argument about prior litigation between the parties did not constitute fundamental error, and therefore the error could not be considered on appeal in the absence of an objection at trial.

It is apparent that no federal question was raised below by Gellert and no federal question was passed on by the appellate court. The Petition should, therefore, be dismissed for lack of jurisdiction. *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317 76 L. Ed.2d 527, (1983); *Cardinale v. Louisiana*, 394 U.S. 437, 89 S.Ct. 1161, 22 L.Ed.2d 398 (1969).

II.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THIS CASE DOES NOT INVOLVE ANY FEDERAL QUESTION AND THE DECISION OF THE STATE COURT BELOW DOES NOT CONFLICT WITH THE DECISION OF ANOTHER STATE COURT OR A FEDERAL COURT OF APPEALS.

Rule 17 of the Rules of the Supreme Court of the United States sets forth considerations governing review on certiorari. None of the considerations listed are present in this case. As argued under Point I, Petitioner has failed to raise any federal question in this Court or in the court below. Petitioner has also failed to demonstrate that the decision of the District Court of Appeal of Florida, Third District, conflicts with a decision of any other state court or of any federal court. There are, therefore, no factors present which would justify granting review in this case.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

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MURRAY, P.A.
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Miami, Florida 33133

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 10 day of January, 1986 to: Daniel Gonzales Gellert, P.O. Box 370, Cocoa Beach, FL 32931.

By: Kathleen M. O'Connor
KATHLEEN M. O'CONNOR

Appendix

Daniel G. GELLERT,

Appellant,

v.

EASTERN AIR LINES, INC.,
a Delaware corporation,

Appellee.

District Court of Appeal of Florida,
Third District.

March 12, 1985.

Rehearing Denied April 19, 1985.

Appeal from Circuit Court, Dade County; Margarita Esquiroz, Judge.

Daniel Gonzales Gellert, in pro. per.

Thornton, David & Murray and Kathleen M. O'Connor, Miami, for appellee.

Before SCHWARTZ, C.J., and DANIEL S. PEARSON and JORGENSON, JJ.

PER CURIAM.

AFFIRMED

Applegate v. Barnett Bank of Tallahassee, 377 So.2d 1150 (Fla. 1979); *Sears Roebuck & Company v. Jackson* 433 So.2d 1319 (Fla. 3d DCA 1983).

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA THIRD DISTRICT

CASE NO. 84-1581

DANIEL G. GELLERT,

Appellant,

vs.

EASTERN AIR LINES, INC.,
a Delaware corporation,

Appellee.

APPEAL FROM THE CIRCUIT COURT, DADE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE, EASTERN AIR LINES, INC.

THORNTON, DAVID & MURRAY, P.A.
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INTRODUCTION

This case involves a pro se appeal by Daniel G. Gellert ("Gellert") from an adverse final judgment in a defamation action against Eastern Air Lines, Inc. ("Eastern").[1] This matter was tried before a jury for approximately one week, however, Gellert has designated only a small portion of the trial testimony for inclusion in the record on appeal. The trial transcript contains the testimony of two witnesses, elicited during Gellert's case in chief, and defendant's closing argument. The lack of an adequate record makes it difficult to present a thorough statement of the case and facts. In addition, in some instances it is impossible to respond substantively to argument raised by appellant where the record does not reflect the proceedings discussed in appellant's argument.

Eastern would like to point out that it has not waited quietely until the filing of the Answer Brief to call attention to the fact that the appellant has a duty to provide an adequate record. Eastern previously filed a Motion to Compel Compliance with Appellate Rules, based on the fact that Gellert had not filed a Designation to the Court Reporter. Eastern also filed a Motion to Strike appellant's Motion for Relief, etc. (The Court has elected to treat Gellert's Motion for Relief, etc. as an initial brief). In a seven page Motion to Strike and Memorandum of Law, Eastern pointed out that Gellert's Motion for Relief had been filed prior to the preparation of a trial transcript and that the transcript, when filed,

---

[1]Mr. Gellert was represented by counsel throughout the proceeding below.

would not support the vast majority of the allegations and arguments raised in the brief. The Motion to Strike was denied.

Once the inadequacy of the record was pointed out, however, Gellert had an opportunity to supplement the record with an adequate transcript, if he desired to do so. In this Answer Brief, Eastern has addressed all issues raised by Gellert and has offered substantive argument where possible.

STATEMENT OF THE CASE AND FACTS

Daniel G. Gellert sued his employer, Eastern Air Lines, Inc. for defamation. [R. 1-5][1] The suit was based on statements allegedly made by Jim Ashlock, director of Eastern's news bureau, during a telephone interview in November of 1978, with David Blundy, a reporter for the London Sunday Times. [R. 1-5]. Ashlock was asked to comment about an ongoing dispute between Eastern and Gellert. In an article published in the Times on November 19, 1978, Ashlock is quoted as saying:

> Gellert has been complaining for years. I think you ought to know that he wrote some odd letters to the FBI (Federal Bureau of Investigation). He said Eastern was out to get him, that we tried to crash a plane in order to kill him, that we deliberately altered the altitude instruments on a plane he was flying. He's paranoid.

---

[1]In this brief the Record on Appeal will be referred to by the symbol "R" and the trial transcript will be referred to by the symbol "T."

According to the article, Blundy questioned why Gellert was permitted to fly Eastern's passenger jets, to which Ashlock reportedly replied:

> It's awfully hard to fire anyone these days. Anyway, we have three of them in the cockpit. Know what I mean?

[R. 5].

Gellert's suit was tried before a jury for the first time in November of 1980, and the jury returned a verdict in Gellert's favor. [R. 437]. The final judgment entered in Gellert's favor was reversed on appeal to this court based on an abuse of the trial court's discretion in regulating Eastern's use of peremptory challenges during jury selection. *Eastern Air Lines, Inc. v. Gellert*, 438 So.2d 923 (Fla. 3d DCA 1983).

On remand, the case was tried for a second time, and the jury returned a verdict for Eastern. A final judgment was entered in favor of Eastern, and this appeal followed. [R. 854].

SUMMARY OF ARGUMENT

Appellant, Gellert, has argued that the trial court improperly excluded evidence during the trial of this case. However, based on appellant's failure to provide a trial transcript showing what evidence was offered and what rulings were made by the court, the evidentiary rulings must be upheld.

Gellert has argued that defense counsel called him a criminal during the trial. This cannot be the basis for error where the trial transcript clearly shows that this never occurred and where the conversation in which the statement allegedly was made took place while the jury was not present.

Appellant argues that defense counsel made improper remarks in closing argument, however, this point was not preserved for review where no objection was made at trial.

Appellant has also discussed the issue of punitive damages, however, there can be no error in the failure to award punitive damages where there was no award of compensatory damages.

ISSUE ON APPEAL

WHETHER TRIAL COURT ERRED IN ENTERING A FINAL JUDGMENT IN FAVOR OF DEFENDANT, EASTERN AIR LINES.

ARGUMENT

THE TRIAL COURT CORRECTLY ENTERED A FINAL JUDGMENT IN FAVOR OF DEFENDANT, EASTERN AIR LINES.

Appellant has raised the following matters in his original brief: (1) the exclusion of evidence during trial by the trial judge; (2) allegations that defense counsel called Gellert a criminal while the trial was in recess and the jury was not present; (3) a statement by defense

counsel during closing argument about the result of prior trials to which no objection was made at trial; and (4) the jury's failure to award punitive damages. Each point will be discussed in this Answer Brief.

1. **Exclusion of evidence**

Appellant, Gellert, has argued that the trial judge unfairly excluded some of the evidence he desired to present at trial. However, the trial transcript does not reflect any of the trial court's evidentiary rulings. Gellert has provided a transcript of the testimony of two of defendant's employees and the closing argument of Eastern's trial counsel. Undersigned counsel finds it impossible to respond to this issue without knowing what evidence Gellert wished to present, and whether the evidence was ever offered at trial by Gellert's attorney. If the evidence was offered at trial, it is impossible to tell exactly what evidence was offered. It is also impossible to guess whether the evidence was relevant; whether the evidence, if relevant, was cumulative; or whether the evidence was offered in the proper form. It is also impossible to tell what the trial judge ruled and whether some evidence was totally excluded or simply limited. Similarly, it is unknown whether the trial judge excluded testimony of witnesses or documentary evidence, or both. Because undersigned counsel has no idea what items of evidence were excluded by the trial court, it is just not possible to address the merits of this issue.

It is axiomatic that rulings made by the trial court are presumed to be correct, and it is the burden of the appellant to clearly demonstrate error. *Applegate v.*

Barnett Bank of Tallahassee, 377 So.2d 1150 (Fla. 1979); *Ruppenthal v. Wood*, 425 So.2d 194 (Fla. 3d DCA 1983). Admission of evidence is a matter within the sound discretion of the trial judge, whose decisions in that regard must be reviewed in the context of the entire trial. *Jiminez v. Gulf & Western Manufacturing Co.*, 9 FLW 2257 (Fla. 3d. DCA Oct. 9, 1984); *Division of Corrections v. Wynn*, 438 So.2d 446, 448 (Fla. 1st DCA 1983). It has specifically been recognized that the admission of "background evidence" is generally a matter left to the discretion of the trial court. *Goode v. State*, 50 Fla. 45, 39 So. 461 (Fla. 1905); *Huffman v. Peek*, 102 So.2d 641 (Fla. 2d DCA 1958); 3 *Fla. Jur.* 2d, *Appellate Review* §336, fn. 58. The trial court's decisions in regard to the admission or exclusion of evidence will not be disturbed in the absence of a clear showing of abuse of discretion. *Buchman v. Seaboard Coast Line R. Co.*, 381 So.2d 229 (Fla. 1980); *Lasar Mfg. Co., Inc. v. Bachanov*, 436 , So.2d 236 (Fla. 3d DCA 1983); *Huff v. Belcastro*, 127 So.2d 476 (Fla. 3d DCA 1961).

In order to carry the burden of clearly demonstrating reversible error, appellant is required to bring to the court a trial record which contains all proceedings that must be considered in order to determine whether prejudicial error occurred. *Ben-Hain v. Tacher*, 418 So.2d 1107 (Fla. 3d DCA 1982); *Harmony Homes, Inc. v. Sevened, Knight, Boerema, Buff*, 355 So.2d 490 (Fla. 3d DCA 1978); *Greene v. Hoiriis*, 103 So.2d 226 (Fla. 3d DCA 1958). Where, as here, appellant fails to provide an adequate record, an affirmance is mandated. *Applegate v. Barnett Bank of Tallahassee*, 377 So.2d 1150 (Fla. 1979); *Moye v. Bayou Grande Villa Association*, 10 FLW 47 (Fla. 1st DCA Dec. 20, 1984); *Peters Machinery Corp. v. Blairville Mach. Products Co.*, 413 So.2d 802 (Fla. 3d

DCA 1982). Therefore, rulings made by the trial court in regard to the admissibility of evidence should be affirmed.

2. **Alleged Statements made during a Trial Recess.**

According to Gellert, defense counsel called him a criminal during a trial recess. The portion of the trial transcript furnished by Appellant reveals that this simply did not occur. (T. 41-45). The transcript shows that during a recess, Gellert's attorney stipulated to the withdrawal of one of Plaintiff's trial exhibits. Defense counsel asked for a copy of the exhibit for possible further proceedings:

> MR. DAVID [defense counsel]: . . . [T]here's another proceeding after this trial relative to that letter and your Honor may have to make some rulings.
>
> THE COURT: What proceedings are your taking about?
>
> MR. DAVID: I'm taking about creating a complex situation and physically slipping it in on us without having seen it. It concerns sabotage.
>
> It's never been received, never been received, never been identified in 13 years of litigation. [T. 42-43]

After Plaintiff's attorney stipulated to the withdrawal of the exhibit in question, the jury returned to the courtroom. [T. 45].

Even if defense counsel had called Gellert a criminal, Gellert could not have been prejudiced because the jury was not present. It is firmly established that a judgment will not be reversed because of errors that do not prejudice substantial rights of the appellant or affect the result of the action. *See* Section 59.041, Florida Statutes (1983).

3. Remarks of Defense Counsel During Closing Argument.

Appellant, Gellert, has argued that a reversible error occurred when Eastern's defense counsel made the following remarks during closing argument:

> Mr. Gellert has brought five lawsuits, 30 or 30 grievances, so don't you be the first jury to award him in one.

[T. 109]. It is correct that Gellert has never made a recovery against Eastern Air Lines in any of his prior lawsuits. However, in one prior case, after a jury verdict for Gellert, the trial court granted a renewed motion for directed verdict and entered judgment in favor of Eastern, which was affirmed on appeal. *Gellert v. Eastern Air Lines, Inc.*, 370 So.2d 802 (Fla. 3d DCA 1979), *cert. denied* 381 So.2d 766 (Fla. 1980). In the case at bar, a judgment in favor of Gellert entered after the first trial was reversed, and the case was remanded for a new trial. *Eastern Air Lines, Inc. v. Gellert*, 438 So.2d 923 (Fla. 3d DCA 1983). Therefore, while it is true that Gellert received two jury awards, neither award in favor of Gellert was upheld.

As a general rule, if error is to be predicated on an improper argument of counsel, an objection must be made at the time the argument is presented. *Tillman v. State*, 44 So.2d 644, 649 (Fla. 1950); *Bishop v. Watson*, 367 So.2d 1073, 1076-1077 (Fla. 3d DCA 1979); *H.I. Holding Company v. Dade County*, 129 So.2d 693, 695 (Fla. 3d DCA 1961) *cert. denied* 133 So.2d 646 (Fla. 1961). The Florida Supreme Court has recognized that if counsel does not see fit to object to allegedly improper argument, an appellate court is justified in concluding that the argument was not highly prejudicial. *Rogers v. State*, 158 Fla. 582, 30 So.2d 625 (Fla. 1947). Where an appropriate objection is made, the impropriety of the argument may often be cured by sustaining the objection, by an admonition to counsel, by a retraction of counsel's remarks or by a proper instruction to the jury to disregard the statements. In the case at bar, a retraction of the statement in question could certainly have cured any impropriety, as could an instruction to the jury to disregard the statement.

The only exception to the well-recognized rule that a party must object to improper argument of counsel in order to preserve the matter for appellate review is where there is fundamental error. Some improper remarks are considered so inflammatory that neither rebuke by the trial court nor retraction by counsel, can cure their effect. However, the remarks at issue here were certainly subject to retraction and an appropriate instruction by the court.

To the extent that the remarks constituted a comment on the prior disposition of litigation between the parties, this Court has held that remarks of that nature do not constitute fundamental error. *Sears Roebuck*

& Company v. Jackson, 433 So.2d 1319 (Fla. 3d DCA 1983). In that case, the trial court granted a new trial to plaintiffs on the ground that defense counsel made two improper remarks during trial. In both instances, defense counsel commented on the fact that plaintiffs had previously taken a voluntary dismissal of their case. In reversing the granting of a new trial this court stated:

> While we agree with the trial court that commenting on the plaintiffs having taken a voluntary dismissal was irrelevant to the issues in the case, we do not agree that such remarks were "of such character that neither rebuke nor retraction may entirely destroy their sinister influence. . . . *Baggett v. Davis*, 124 Fla. 701, 169 So. 372, 379 (1936) (quoting *Akin v. State*, 86 Fla. 564, 573, 98 So. 609, 612 (1923)), or, otherwise stated, so inflammatory as to extinguish the plaintiffs' right to a fair trial and to therefore constitute fundamental error. That, being so, these remarks cannot be the basis for a new trial, absent, at least, a timely objection to the first remark, *Bishop v. Watson*, 367 So.2d 1073 (Fla. 3d DCA 1979), and a timely motion for mistrial directed to the second remark. . . . [Extensive citations omitted].

433 So.2d at 1321.

In his brief Gellert has argued that a jury instruction should have been given in regard to the remarks of defense counsel. However, in the absence of any objection or motion for mistrial or request for an instruction by Gellert's trial attorney, the remarks of defense counsel cannot form the basis for finding error.

(4) Failure of the Jury to Award Punitive Damages.

Gellert has discussed the issue of punitive damages in his brief. However, it is well established that a plaintiff who is not awarded compensatory damages may not recover punitive damages. *McLain v. Pensacola Coach Corp.*, 13 So.2d 221 (Fla. 1943): *Martin v. United Security Services, Inc.*, 314 So.2d 765 (Fla. 1975). There can, therefore be no error in regard to the failure to award punitive damages.

CONCLUSION

The final judgment entered in favor of Eastern Air Lines, Inc. should be affirmed.

By: s/_____
KATHLEEN M. O'CONNOR

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 28th day of January, 1985, to Daniel Gonzales Gellert, P.O. Box 187, Cocoa Beach, Florida 32931.

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By: s/_____
KATHLEEN M. O'CONNOR

Supreme Court, U.S.
FILED
JAN 16 1986
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO. 85-1020

in the Supreme Court of the United States

OCTOBER TERM, 1985

DANIEL GONZALES GELLERT,

Petitioner,

vs.

EASTERN AIR LINES, INC.

Respondent,

On Petition For a Writ of Certiorari
On Appeal From the Supreme Court of Florida

RESPONSE BRIEF OF THE PETITIONER

DANIEL GONZALES GELLERT
in the proper person
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THERE IS NO BAR AS THE CERTIORARI AND REVIEW IS BASED UPON FEDERAL LAW, AND ON CONFLICT IN THIS CAUSE AND OTHER DECISIONS OF FEDERAL APPEAL COURTS, AND A NUMBER OF FEDERAL QUESTIONS EXISTS, WHICH HAVE NOT PREVIOUSLY BEEN DECIDED BY THE SUPREME COURT, BUT SHOULD BE.

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JURISDICTION

The final judgment was entered by the trial court on June 12, 1984. Case No. 79-2402 (CA 10). This was affirmed per curium by the Third District Court of Florida on March 12, 1985; see: *GELLERT v. EASTERN AIR LINES, INC.*, 466 So.2d 9 mem (Fla.3DCA 1985). Rehearing was denied April 19, 1985.

The Florida Supreme Court denied jurisdiction on July 24, 1985.

The jurisdiction of this Court is invoked under 28 U.S.C. #1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment of the United States Constitution provides in part:

> . . . (N)or abridging the freedom of speech . . . and to petition the Government for a redress of grievances.

Article 1. Section 8. of the United States Constitution provides in part:

> To regulate Commerce with foreign Nations, and among the several States,

The Seventh Amendment of the United States Constitution provides in part:

> In Suits at common law, ... the right of trial by jury shall be preserved, and no fact

tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

The Eighth Amendment of the Constitution of the United States provides in part:

. . . nor cruel and unusual punishment inflicted.

REPLY TO ARGUMENTS FIRST RAISED IN OPPOSITION BRIEF

The respondent argues that Certiorari should be denied because:

1. No federal question has been raised.

2. No federal question has been raised below.

3. The decision of the state court does not conflict with any other decisions such as a decision of a federal appeals court.

4. That under Florida law, *APPLEGATE v. BARNETT BANK of TALLAHASSEE* 377 So.2d 1150 (Fla. 1979) controls, and that the determination on appeal was just and proper.

IN REPLY:

1. There are federal questions in this cause under the Constitution of the United States. Involving the First Amendment rights of both the respondent and petitioner. There is a conflict of the First

Amendment right of the respondent, and the Commerce Clause rights of the petitioner.

Since the respondent libeled as a joke, there is the imputation of an intentional tort, which was a bad faith comment and the right of personal opinion is unconstitutional. The framers of the Bill of Rights, First Amendment never intended for a previlege in an intentional tort.

The Supreme Court of the United States can not approve a libel under the First Amendment, which was published for the sole purpose of abridging the First Amendment rights of free speech of the petitioner, since this would be a government approval of cruel and unusual punishment, as applied to the petitioner. This is unconstitutional.

The medical competence of the petitioner is well established. The requirement of the medical authority of the respondent is the result of the Commerce Clause, raising other questions of privacy and Constitutional confidentiality, which this Court must review.

2. The federal question was raised below, since the appeal in the state courts resulted in a per curium affirmance, the federal question had to be preserved at the trial court. In its brief, the petitioner enclosed the Motion for a New Trial in its entirety. See: App.2-4

The petitioner did argue before the Third District Court of Appeal, and the Supreme Court of Florida the federal and Constitutional issues.

The federal court have de novo review responsibility in libel action of evidence of actual malice. See: B15. *MARCONE v. PENTHOUSE INTERN. MAGAZINE FOR MEN* 754 F.2d 1072 (1985).

3. The Final Judgment does conflict with decisions of federal appeals courts. Ashlock, the spokesman for the respondent utilized undisclosed facts, or rather undisclosed confidential medical information from the respondents file, which was unknown to the reader, which was not in the article; and as such he is not entitled to the First Amendment right to his personal opinion. B16 *CLARK v. AMERICAN BROADCASTING CO., INC.* 684 F2d 1208 (1982) B3, *McMANUS v. DOUBLEDAY & CO., INC.* 513 F.Supp. 1383 (1981).

4. *APPLEGATE v. BARNETT BANK OF TALLAHASSEE* 377 So.2d 1150 (Fla. 1979) does not control in this cause. This case involves a different circumstance: "After a nonjury trial without a reporter," there was not a record available.

The Florida Rules of Appeal, Rule 9.200 (f) (2) controls. See: *BEI v. HARPER* 475 So.2d 912 (Fla.App.2Dist. 1985). If there was an insufficiency of the record, then the petitioner had the right under this rule to provide the necessary and incomplete record on the order of the Court. This Rule prohibits the Court from taking any action, as it did in this cause until an opportunity has been provided the petitioner. This did not happen in this case. There was not an order

from the Court, and the respondent failed to enforce its rights under this Rule, as there was a remedy available. The respondent intentionally mislead the District Court, the same as it is attempting to mislead the Supreme Court of the United States presently.

ARGUMENT

The respondent, its insurance carrier U. S. Aviation Underwriters, and its attorneys have assaulted the reputation of the petitioner as a paranoid, who is not mentally competent to perform his flying duties, he is not a normal individual, and so on.

Since the trial of this cause a number of events have transpired which leads the average prudent individual on the street to come to the conclusion that the problems lie with the respondent, its attorneys and insurance company.[1]

The reason that the Constitutional rights of the petitioner have been transgressed is mainly because the respondent has been able to intentionally mislead the courts.

Francis Anania, Eastern's and USAIG's attorney of Blackwell, Walker, Gray, Powers, Flick & Hoehl P.A. of Miami, has been found and fined by the federal jurisdiction of misconduct and bad faith; false and contemptuous representations; bad faith obstruction of discovery. See: *CARLUCCI v. PIPER AIRCRAFT*

[1]See: App.1, App.2, App.3

CORP., INC. No 84-5576 November 12, 1985, United States Court of Appeals Eleventh Circuit. App.1.

Anania was the attorney of record in the initial trial of this cause. A witness in the retrial.

The instant law firm, Thornton, David & Murray, P. A. was involved in a criminal action, since one of its attorneys left the jurisdiction with about $160,000.00 of the clients money. App.2

USAIG, United States Insurance Underwriters were involved in an illegal activity, in which a clandestine investigative and management organization was siphoning NTSB, National Transportation Safety Board investigation material, to defend itself, USAIG, in insurance coverage suits. For this illegal activity Piper Aircraft was fined $160,000.00 by the NTSB. App.3.

The petitioner is on notice that the opposition, is dishonest, and will do anything to deny the petitioners Constitutional rights during these proceedings. These actions are a form of habit, and not an occurrence, but definitely the manner in which the conduct of legal business is conducted, and so it is incumbent on this petitioner to so inform the Court.

There is a responsibility that an attorney must act as officer of the Court, and not a provider of false and misleading information. See: *Carlucci Supra*, and Disciplinary Rule 7-106B.

The determination of personal opinion, is a matter of law to be determined by the court, since it is of a Constitutional First Amendment origin, and not a fact

under the Seventh Amendment of the United States Constitution.

It is unconstitutional, and therefore a reversible error, in this cause to have submitted the determination of this Constitutional question to the jury.

The Seventh Amendment makes it clear;

> and no fact tried by a jury . . . . . then according to the rules of the common law.

The jury under the Constitution can make only a determination of fact, the application and interpretation of the Constitution is not in its factual capability.

While the courts are barred from reversing and substituting their own opinion as to what the facts in a case should or should not be, a jury is not impowered to make other than a factual determination in this cause.

Since in this cause, the evidence is that a defendant/respondent libeled as a matter of right, in the mood of a joke, the intentional nature of this tort would make the granting of the defense of personal opinion unconstitutional.

As a retrial, the Third District Court of Florida already ruled that a jury could properly have made this determination, nothing that the petitioner could have said, should have said could have influenced the trial court. B14, B23-24.

To punish the petitioner for the exercise of his free speech, by a libel of this magnitude is cruel and unusual punishment.

CONCLUSION

The respondent failed to offer any substance in fact or law which would interfere or limit this Courts jurisdiction in granting Certiorari for review.

The mere fact that Eastern was successful in misleading the Third District Court of Florida by arguing *Applegate Supra*, which is not proper law in this cause, should not bar this review.

Under Florida law, as determined by the Florida Supreme Court, the cases attached by the District Court's per curium affirmance are of no significance in appeal since that Court lacked jurisdiction to review. By Eastern's own admission there was no reviewable opinion but an affirmance.

This cause must tumble back to the jury verdict granting the defendant corporation the First Amendment right to commit this libel.

The denial by the District Court the right of the petitioner to correct the record by having all the court reporters trial transcript is a reversible error, on its own, since it denied the petitioner's civil rights to a fair and impartial trial and review. The Appellate Rules should apply to rich and poor.

The Petition for Writ of Certiorari should be granted.

DANIEL GONZALES GELLERT

/S/ _____
in the proper person
P. O. 370
Cocoa Beach, Florida 32931
Tele: 305-784-2769

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this day of January, 1986 to: Thornton, David & Murray, P.A. Suite 100, 2950 S.W. 27th Avenue, Miami, Florida 33133

By /S/ _____
Daniel Gonzales Gellert
in pro se
P. O. 370
Coca Beach, Florida 32931

Appendix

Friday, June 29, 1984/The Miami Herald

Piper lawyer fined for prolonging case

By LISA HOFFMAN, *Herald Staff Writer*

Two federal judges, angered by the "obstructive misconduct" of a prominent Miami lawyer in a complicated airplane crash case, Thursday ordered him to pay $10,000 as punishment for his irresponsibility.

Francis Anania, who has represented airline companies in many of the nation's worst crashes, was reprimanded for deliberately thwarting a six-year court battle involving Piper Aircraft Corp. and the relatives of three men who died in a 1976 crash.

"The record reveals that he was rude and uncooperative from the outset and that he personally obstructed the discovery process," U.S. District Judges James C. Paine and William Campbell wrote about Anania.

After approving the settlement, Campbell chastised Anania for using delaying tactics and deception throughout the case, which involved dozens of witnesses on two continents, four judges, more than 100,000 pages of documents and unusually acrimonious exchanges between attorneys for both sides.

Anania, a partner in the law firm of Blackwell Walker Gray Flick & Hoehler, intentionally dragged his feet when ordered to produce material for attorneys for the victims' families, the judges wrote in the order, filed in West Palm Beach.

Anania "has failed to perform his administrative responsibilities as an officer of this Court," they continued, stopping short of finding the attorney in contempt.

Local News

Sunday, November 24, 1985 The Miami Herald Section B

Lawyer vanishes, leaves financial muddle behind

By MARC FISHER, *Herald Staff Writer*

Carl Welch Taylor skipped the country—with $160,000 he took from his own clients, according to his boss, Calvin David.

Taylor doesn't work for the firm of Thornton, David and Murray anymore. David fired him.

The first clue came around Oct. 10, when a client complained he hadn't received a $75,000 settlement fee that Taylor had negotiated in a boat repairs case.

David had the bookkeeping department check. The money had come into the firm. It just hadn't gone out, David said.

He said Taylor had rigged the transaction. Instead of placing the money in the correct case file for forwarding, Taylor had the money put in an old file that had a name and number, but no client, David said.

"He was dumping in his time and expenses into the small case," David said. "The file had $50,000 of time on it, but he had really spent only a few hundred dollars worth of time."

The next day, David got a letter from another lawyer who said he hadn't received a $60,000 settlement.

"We checked all the accounts and there was no $60,000," David said. The firm found that the money had gone to a Fort Lauderale bank account in Taylor's name.

"The client said he thought it was odd to have to send the money to Taylor's own account," David said.

AVIATION WEEK & SPACE TECHNOLOGY June 24, 1985

Safety Board Fines Piper $160,000

Washington – National Transportation Safety Board has fined Piper Aircraft $160,000, charging that the general aviation aircraft manufacturer violated regulations by employing a company that represented insurance firms to participate in aircraft accident investigations conducted by the safety board.

Safety board regulations state that manufacturers cannot be represented by claimants or insurers during aircraft accident investigations.

The conflict between the safety board and aircraft manufacturer began in April, 1984, when Piper asked that employees of Aerospace Management Services International (AMSI) be allowed to represent the company in those accident investigations involving the aircraft manufacturer. At that time, AMSI was a wholly owned subsidiary of United States Aviation Underwriters. The management concern has been allowed to represent engine and component manufacturers in accident investigations held by the board.

"We asked Piper later in the year for records which detailed its relations with AMSI," the safety board official said. "The board wanted to satisfy itself that the management company would be representing Piper and not an insurer in the accident investigations."